

MAINE STATE HARNESS RACING COMMISSION
MINUTES OF MEETING
OCTOBER 28, 2021
HELD ONLINE VIA ZOOM APPLICATION

Commission Members Present: Timothy Archambault, Chair, James Kelley, Jr., Richard Shiers, and Barry Norris

Commission Members Absent: Edward Kelleher

Staff Members Present: Henry Jennings, Carol Gauthier, Joy Bonenfant, Miles Greenleaf, Jaime Wood, and Dr. Zachary Matzkin

1. **Call the Meeting to Order and Introductions** Timothy Archambault, Chair
2. **Executive Session.** The Commission will go into executive session to receive legal advice. AAG, Guay stated the motion would be to go into executive session to receive advice as to your roll and responsibilities from your counsel. Commissioner Kelley made a motion to go into executive session. Commissioner Norris seconded. AAG, Guay called the roll call vote.

ROLL CALL VOTE

Tim Archambault:	YEA
Barry Norris:	YEA
Richard Shiers:	YEA
James Kelley, Jr.:	YEA
Edward Kelleher:	ABSENT

Motion passed 4-0. They came out of executive session at 11:17 a.m.

Commissioner Norris made a motion to appoint Commissioner Kelley as pro tem. Commissioner Kelley seconded.

3. **Motion for Reconsideration.** Valerie Grondin, whose appeal of a June 19, 2021 Judges Decision was denied on procedural grounds, has filed a motion for reconsideration.

AAG, Guay stated that the Commission needs to vote on whether this decision and order is accurate.

**MAINE STATE HARNESS RACING COMMISSION
DECISION AND ORDER
IN RE: APPEAL OF VALERIE GRONDIN**

Based on the evidence reviewed by the Commission at the appeal hearing held on October 12, 2021, the Commission adopts the following Findings of Fact as follows:

1. **Pembroke Ali raced in the third race at First Tracks Cumberland on June 19, 2021,**

2. **Pembroke Ali finished first in the race. A dispute arose whether Pembroke Ali had interfered with another horse during the race,**
3. **The judges at the track reviewed the race and concluded that Pembroke Ali had interfered with another horse. As a result of their finding, Pembroke Ali was placed sixth.**
4. **Appellant Valerie Grondin filed her written appeal on June 23, 2021.**

Based on these Findings of Fact, the Commission concludes that, as a matter of law, Ms. Grondin did not file her appeal within the time required by Commission Rule, Chapter 19 Section 3 (1)

Therefore, the appeal is DENIED due to lack of jurisdiction.

Commissioners:

Timothy Archambault:	NOT PRESENT
Barry Norris:	YEA
Richard Shiers:	YEA
James Kelley, Jr.	YEA
Edward Kelleher	NOT PRESENT

This written Decision is adopted on October 28, 2021

Motion passed 3-0.

APPEAL RIGHTS

Pursuant to the provisions of 5 M.R.S. §§ 11001-11003, any party that appeals this Decision and Order must file a Petition for Review in the Maine Superior Court within 30 days of receipt of this Order. The petition shall specify the person seeking review, the manner in which they are aggrieved and the final agency action which they wish reviewed. It shall also contain a concise statement as to the nature of the action or inaction to be reviewed, the grounds upon which relief is sought and a demand for relief. Copies of the Petition for Review shall be served by Certified Mail, Return Receipt Requested upon the MAINE STATE HARNESS RACING COMMISSION, all parties to the agency proceedings and the Attorney General.

AAG, Guay asked Mr. Jennings if he plans to present a request for reconsideration for today. Valerie Grondin do you anticipate recourse for reconsideration today. They both said yes. Let the record reflect that the decision and order was voted on for reconsideration. As Commissioners you can say the motion was timely submitted. He has seen a petition for reconsideration

Who has to get the petition? Some people would say the Commission needs to receive the petition. You either have a presiding officer or as a matter of law the executive director they stand in the shoes of the Commission. So, for example when people submit license applications, they don't submit them to each Commissioner independently. People do not give you information directly that's not allowed under adjudicatory proceedings. Your role is as

judges. What the law says and what the rule say are all of these proceedings are Title 5 proceedings. They receive the information through hearings. They receive information through orders of the presiding officer. In this case they anticipate that the case and the appeal will be heard today. He issued a procedural order to circulate the exhibits to the parties. The first question is “Did the Commission receive a petition?” The answer is yes. The Commission is not the Commissioners. When it says the Commission, it makes reference to either your presiding officer or your executive director. The next question he anticipates is whether or not Mr. Jennings has standing to bring a petition for reconsideration. That is a question that he particularly argued in Superior Court in the matter of Department of Agriculture versus the Maine Harness Racing Commission, and they had moved that the court not hear from the Department because the Department was not a party under the law. The Department was not an aggrieved party. The very same language that is conveyed in the reconsideration rule is the same language in the appeal language under Title 5. The court found that argument not to be compelling. The court found that the Department in fact does meet the definition of an aggrieved party, so the case was not dismissed on that basis. Likewise, applying the findings of the Department of Agriculture versus the Maine Harness Racing Commission that decision has standings to bring a reconsideration. They have established this matter of record that there is a reconsideration was received by the Commission and it has been received within 10 days of the decision and order.

After discussion, Commissioner Kelley stated what you are asking the Commissioners is to reconsider the reconsideration here today. AAG, Guay stated as the hearing officer he thinks he doesn’t decide but what he does is he looks at things is it in order to be heard today, and he thinks at least his perception is that it is, and you would hear arguments to those two factors if you chose to go. Commissioner Kelley stated that’s fine but the only issue he has is that he received something this morning from Mr. Jennings earlier. He hasn’t had time to look at. If the Commission wants to go forward with this, he wouldn’t be opposed to that. Mr. Jennings stated he has a fairly long and detailed motion to reconsider, and it’s based on both criteria on whether the Commission made an error that they didn’t intend to or whether there was additional evidence that they didn’t have at the time. He can go through all pieces of that, but he wanted to first do he has to go through all of it or try one argument at a time. AAG, Guay stated would it be helpful if he asked a couple of questions. Mr. Jennings you’re aware of the criteria that’s required for the Commissioners to reconsider. Mr. Jennings stated yes. AAG, Guay stated do you think the Commissioners may have received a mistake in the facts as to when the date of the time period would have applied. Do you believe that was the case in regard to the prior proceeding? Mr. Jennings stated he does. He stated they were told 72 hours and it doesn’t say that. It was 3 days. Then the question becomes what are the 3 days. The 3 days he thinks historically probably applied as 3 calendar days but the way the rule reads, he would say there is an argument that it should be interpreted as 3 business days. After further discussion, the hearing was tabled.

4. Adjudicatory Hearings:

a. RE: Adam Gray, Complaint Number 2019 MSHRC 15. Mr. Gray is alleged to have violated Commission Rule Chapter 11, Section 5.5.B. Commissioner Kelley opened the hearing on Adam Gray. He qualified the Commissioners. Henry Jennings shared his screen. He moved to admit the exhibits. Exhibit 1, Notice of Hearing dated 9/15/2021; Exhibit 2, 2019 License Application; Exhibit 3, Program of August 5, 2019; Exhibit 4, Memorandum dated 7/2/2021 that Mr. Jennings wrote interview with Adam Gray, Exhibit 6, Joint Exhibit with the two parties. Attorney Childs objected to Exhibit 4, Memorandum being introduced into evidence. He does not object to Exhibit 1, 2, and 3. Mr.

Jennings stated that the hearing officer would have to rule on whether or not Exhibit 4 can be admitted. Attorney Childs stated traditionally administrative hearings reports from police officers other investigating officers are not admissible by themselves. The author of the report can testify the report itself does not need to be admitted. There is information within the report that he absolutely object to being part of the record. There is reference in that to matters for which there is not substantial evidence. There is information alleged in that report sufficient evidence to establish that at this hearing the information he has been provided thus far. They should take the factual allegations individually so they can have a proper record. Mr. Jennings stated that the state moves to withdraw Exhibit 4 because the information can be brought in by testimony. Commissioner Kelley stated that's fine but he as the hearing officer has not read that, so he doesn't have any way as long as you and Attorney Childs agree. That's all he can do. Mr. Jennings stated he doesn't think it is critical because he agrees with Attorney Childs that the information to the extent that it's admissible can be brought through testimony. Commissioner Kelley stated that's fine. Mr. Jennings stated at this point, he will note there is a proposed set of findings in the matter of Adam Gray. In the Matter of Adam Gray stipulated facts and violations which could be exhibited, could be admitted as joint exhibit 1. He asked Attorney Childs if he was familiar with that document. Attorney Childs stated yes, and there is no objection to it. Mr. Jennings shared his screen with the document "In the matter of Adam Gray stipulated facts/violations". He would move that to be admitted as Joint Exhibit 1. Attorney Childs stated no objection. Mr. Jennings stated what you have in front of you is an admission of a violation on the part of the licensee and you've got to decision whether that is sufficient evidence to document a violation. The state rests at this point on the violation phase. Attorney Childs stated they rest as well. Commissioner Kelley asked Mr. Jennings if that's the only violation he's bringing. Mr. Jennings stated that's the only violation the state determined there was sufficient evidence to support. Commissioner Kelley stated they need to determine whether or not there was a violation. He guests that has been determined. Is that your opinion also Commissioner Norris? Mr. Jennings stated Commissioner Shiers is back now. Commissioner Kelley stated he doesn't think they need to vote on that, right Mr. Jennings. Mr. Jennings stated he thinks it's stipulated. He asked Attorney Childs if he thinks that is correct. Attorney Childs stated yes. Mr. Jennings stated they could move to the penalty phase. Commissioner Kelley asked if any Commissioner had any questions. Commissioner Shiers stated he had a question for Mr. Gray. Commissioner Kelley gave Mr. Gray his oath. Commissioner Shiers asked Mr. Gray a question. Attorney Childs objected. Commissioner Kelley asked a question of Mr. Gray and Attorney Childs objected. Attorney Childs stated the Notice of Hearing doesn't indicate that he's being charge with not calling the horse in as sick or otherwise. Commissioner Kelley stated what he is telling him is they cannot ask or get answered any relative questions other than what is before them. Attorney Childs stated they have a charge nicely contained in paragraph 4 of the stipulated facts and any questions relating to his injecting the horse is certainly appropriate. Questions whether those injections caused the horses death or not that's not charged and there's no evidence of that and he would object to that area of inquiry. Commissioner Kelley asked Commissioner Norris if he had any questions. Commissioner Norris had no questions. Commissioner Kelley stated since there is no more evidence being presented, they can move to the penalty phase. Mr. Jennings stated he thinks it's been established there has been a violation and the licensee agrees with the violation and the violation is listed in Chapter 11, Section 5. He thinks yes, the answer is yes. He can now move to the penalty phase because there's really nothing to debate on the violation phase. Commissioner Kelley stated with them not being represented with an attorney he would like some questions answered before they move on. Mr. Jennings stated Commissioner Kelley was knocked off. He asked Commissioner Norris if he wanted to move to the penalty phase. Commissioner Norris stated he was happy to move to the penalty phase. He asked Mr. Jennings if he had a recommendation. Mr. Jennings stated there's no specific citation in Chapter 17 for

this particular violation it's going to be a matter of interpretation. One of the products that was injected is acetylcysteine which in 2019 was not on the list of prohibited substances for the Association of Racing Commission International, but it is now which is not a factor you can use to consider. Commissioner Kelley rejoined at this time. Mr. Jennings stated basically acetylcysteine would if you tried to categorize it based on the definitions contained in the ARCI Uniform Classification you would probably arrive at the same place that they did which was to classify it as a "C" prohibited substance. That would basically give you something to try to figure out where it fits in Chapter 17. Commissioner Norris stated so Chapter 17, page 9 is what they are referring to as far as the violation stage, correct Mr. Jennings. Mr. Jennings stated he agreed with him. Commissioner Norris asked if they are looking at Class C penalty. Mr. Jennings stated it's fair to do that and he would look on the righthand column. Commissioner Norris stated he understands. Attorney Childs we are all on the same page. Commissioner Norris asked is this first offense within 365 days. Is that correct Mr. Jennings. Mr. Jennings stated that is correct. Commissioner Norris stated so dealing with just this and nothing else they're looking at a minimum penalty of \$500 is that not correct Mr. Jennings. Mr. Jennings stated that's correct if you look in the righthand column. Commissioner Norris stated he's looking at the righthand column first offense within 365 days and looking at a minimum penalty of \$500. Are you on board with that so far? Attorney Childs stated he understands that's the rule that's in place today but that was not the rule that was in place in 2019 when this violation occurred. Mr. Jennings proposed that if you use the definition section of prohibited substances which is the procedure you normally use if you have an unlisted substance that you would end up in the same place that you would probably come up in with something similar to a Class C prohibited substance. Commissioner Norris asked Attorney Childs if he argued something different than that. Attorney Childs stated in 2019 when this violation occurred this medication was not listed as a Class C. Commissioner Kelley returned to the meeting at this point. Commissioner Kelley asked Mr. Jennings how does he even know what was administered. What are you using for that? Did the horse have a postmortem. Mr. Jennings stated the horse had been buried before he was notified. That was something that Mr. Gray told him. Commissioner Kelley stated so you're going by what he told you. Mr. Jennings stated that's correct. Commissioner Norris asked Attorney Childs if he disagreed with the state's opinion? Attorney Childs stated he thinks again they can look at the Class C penalty as a reference, but he doesn't think it applies to this particular case from a mandatory standpoint. He would say in defense of Mr. Gray. They wouldn't know any of this if he wasn't fully forth coming and explaining all the circumstances that occurred here. This is solely based on his honesty and openness with the Commission. This particular medication was not charged in the charging agreement. He objects to that on a procedural basis. He doesn't object to them looking at the schedule C penalties as a general reference but saying that the minimum mandatory applies to this case, he thinks it would be incorrect. He would object to that. Commissioner Norris stated so you would object to the Commission made a motion to enforce the minimum penalty. Attorney Childs stated the minimum mandatory penalty. He thinks you have discretion to impose a \$500 fine as you see fit, but the mandatory aspect of that in the minimum aspect of that he does object to. Commissioner Norris stated if a Commissioner made a motion to enforce the minimum fine of \$500 would you object to that. Attorney Childs stated no. Commissioner Kelley stated isn't it up to the Commission whether or not they decide on a minimum or maximum. Commissioner Norris stated yes. Commissioner Shiers stated Attorney Childs mentioned about the honesty of Mr. Gray and they wouldn't know anything about this unless it was due to his honesty. It is a prerequisite of a trainer to have a license and if something seriously happens to a horse like death it's their obligation to report that to a racing official, a state steward or state veterinarian to have a postmortem on that particular horse. It's required by Commission rules. Commissioner Kelley stated he would make a motion that the penalty would be \$500- and one-year suspension. Commissioner Shiers seconded. Attorney Childs

stated as to the motion made on July 2, 2021, he filed with the Commission a request for information pursuant to Maine's Freedom of Access Act under Title 1, Section 400 and he specifically asked if paragraph 6 made reference to the Notice of Hearing dated June 21, 2021 does not specify what level or category penalty is being alleged due process and administrative fair play requires sufficient notice in order to avoid unfair surprise. He sees they are likening this to a Class C penalty and being surprised by that particular proposition today. He requested he would be alerted as to what penalty would be recommended. He received no response in that regard. Mr. Jennings as a scientist you know that just coincidence by itself does not establish cause and effect. They are entitled to administrative fair play here. There is no evidence whatsoever what they call causation there is a lack of proof of causation. This medication caused that horse's death. There has to be substantial evidence on the record to support such a finding. Attorney Childs stated he would like to have the USTA's lifetime record for Mr. Gray be part of the record. Commissioner Kelley stated they haven't even established that the horse died or anything else. Commissioner Norris stated to Mr. Jennings correct him if he is wrong. This Class C that they are discussing the minimum penalty deals with fines he does not see where it talks about any suspensions for first violations. Is that correct? Mr. Jennings stated that is correct. Commissioner Norris asked Commissioner Kelley if he would reconsider his motion because if they look at the first offense with minimum penalty \$500 does not include any penalties. The penalty phase for suspension goes for 2nd and 3rd offenses. He asked Commissioner Shiers to withdraw his second. Then he also asked for a new motion. Commissioner Kelley and Commissioner Shiers both withdrew their motion. Commissioner Kelley stated he would make a motion of \$500 fine. Mr. Jennings stated the law says if it's on a grounds of a licensed jurisdiction than you have to notify and the rulings that they have received historically is a grounds of a licensed jurisdiction are those places in which you need a license in order to enter, and you do not need a license to enter the barns at Cumberland and that is why you don't see that in the charge document. Commissioner Norris stated he understands everybody's frustration but dealing with what they have been presented they have a charge that they've been looking at and it was just dealing with the injection of a substance and they need to make a penalty for that charge. He understands everybody has issues outside of that but he's just looking at a specific violation that they've been charged to look at today. Commissioner Shiers seconded the motion. Commissioner Norris stated that he has a motion on the floor to penalize Mr. Gray a \$500 fine for injecting the horse. He called the roll call vote.

ROLL CALL VOTE

Timothy Archambault:	NOT PRESENT
Barry Norris:	YEA
Richard Shiers:	YEA
James Kelley, Jr.	YEA
Edward Kelleher	NOT PRESENT

Motion passed 3-0.

AAG, Guay showed on the screen the delegation order below.

Commission Rule Chapter 21(10) requires that the Chair shall serve as the presiding officer in proceedings. The presiding officer shall administer oath and affirmations, conduct the hearing, set the time and place for continued hearings, determine the order of testimony, fix the time for filing of such additional evidence, briefs and other written submissions as he may allow or require, and

take other action of a similar nature relating to the proceeding may be necessary when the full Commission is unable to meet.

Whenever a presiding officer is disqualified or it becomes impracticable for him or her to continue in the capacity, another presiding officer may be chosen to continue the hearing.

The Commission finds that, due to the complexity of matters set for hearing before it, prehearing conferences, outside of its meetings, are necessary to conduct proceedings. The Commission further finds that the participation of the chair is impracticable given the amount of time required to conduct pre-hearing conferences. The Commission will evaluate the use of contract presiding officers for proceedings in 2022 and beyond.

For matters that are noticed for hearing in calendar year 2021, the Commission designates AAG Ron Guay to act as presiding Officer.

ROLL CALL VOTE

Commissioners:

Timothy Archambault	NOT PRESENT
James Kelley	YEA
Richard Shiers	YEA
Barry Norris	YEA
Edward Kelleher	NOT PRESENT

Motion passed 3-0.

b. **RE: Appeal of a Judge's Decision Winston Campbell.** Mr. Campbell is appealing the June 19 Decision by the judges at First Tracks Cumberland relative to the third race. The judges placed Mr. Campbell's horse, Pembroke Alli, for interference.
This item was not taken up.

5. **Interpretation/Policy Relative to Commission Rule, Chapter 17, Section 5.C, Warnings.** Chapter 17, Section 5.C calls for written warnings for certain prohibited substance violations arising from NSAID overages just above the threshold. In such cases, historical practice has been for the Department to simply issue written warnings. Chapter 17 is unclear on the procedural process, so the Department is seeking the Commission's input.
This item was not taken up.

6. **Other Business.** Mr. Jennings stated he has a request from First Tracks to increase the number of dashes allowed for the fall meet in November and that would be contingent upon consent from Bangor for at least the first week. They want to run up to 14 dashes. Commissioner Kelley stated the question is the horse supply. Mr. Jennings stated he completely agrees but right now they are limited to 10. AAG, Guay stated to be clear you're saying you want to allow the Commission to authorize you to additional dashes unless there are sufficient horses. Is that correct? Mr. Jennings stated that would be his belief. Commissioner Shiers made a motion to allow First Tracks at Cumberland to race 14 dashes per day for the fall meet. Commissioner Kelley seconded. AAG, Guay called the roll call vote.

ROLL CALL VOTE

Tim Archambault:	NOT PRESENT
Barry Norris:	YEA
Richard Shiers:	YEA
James Kelley, Jr.:	YEA
Edward Kelleher:	ABSENT

Motion passed 3-0.

6. Adjourn

Commissioner Norris made a motion to adjourn. Commissioner Kelley seconded. Vote 3-0.

2:24 p.m.